BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34734

NORTHEAST INTERCHANGE RAILWAY, LLC – LEASE AND OPERATION EXEMPTION – LINE IN CROTON-ON-HUDSON, NEW YORK

Finance Docket No. 34735

GORDON REGER – CONTINUANCE IN CONTROL EXEMPTION – NORTHEAST INTERCHANGE RAILWAY, LLC

COMMENT OF THE STATE OF NEW YORK AND
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

The State of New York (State) and New York State Department of Environmental Conservation (DEC) submit the following comments to the Surface Transportation Board (STB) in connection with the two above-captioned matters now pending before the STB. By order dated August 5, 2005, the STB stayed the effectiveness of the notices sought in these two matters and gave Northeast Interchange Railway, LLC (NIR) until August 15, 2005, to respond to the petition filed by the Village of Croton-on-Hudson (Village) which seeks rejection of the notice in No. 34734 or, alternatively, a stay of its effectiveness.

The State and DEC submit these comments to emphasize the importance to New York and its environment of the issues subsumed in these matters. Given the well-documented adverse effects that waste transfer stations may have on the environment and surrounding communities; the environmental studies of the operations already in place at the facility NIR proposes to lease and operate; the resulting imposition of restrictions on those operations; and the STB's statements regarding the responsibility of railroads to seek ways to address state and local concerns, we request the STB to continue the stay issued on August 5, 2005, to permit development of an adequate factual record. That record requires, among other things, full disclosure of the applicant's plans for the facility's operation, a hearing, and a public comment period.

The current facility located in the Village has been operated by Metro Enviro Transfer, LLC, a wholly owed subsidiary of Allied Waste North America, Inc. (Metro/Allied), pursuant to a permit issued by DEC and a special use permit from the Village. Metro/Allied has not been

found to be in violation of its DEC permit since August 22, 2002, and it has complied with DEC consent orders dated March 26 and December 19, 2002, and corrected past unlawful practices. The Village, however, has determined that the facility violated the special use permit issued by the Village. A July 6, 2005, decision of the New York Court of Appeals upheld the Village's revocation of that permit. *Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*, __ N.Y.2d __, available at 2005 WL 1556709 (2005).

Handling of waste is systematically regulated in New York. Depending on the type of waste handled and its amount, facilities that process or transfer waste may not operate except with a permit or registration from DEC and in compliance with operational requirements specified for such facilities by regulation. Often, additional requirements are included by DEC as conditions to the DEC authorization that are relevant to the particular operation and its location. *See generally,* 6 New York Code of Rules and Regulations (NYCRR) Part 360 (rules for solid waste handling); 6 NYCRR Subpart 360-16 (Construction And Demolition Debris Processing Facilities). These conditions address the manner in which waste materials are processed and handled, including the separating, sorting, and crushing of waste, storage on-site of wastes and recyclables, and other conditions designed to prevent a site from becoming a nuisance or otherwise endangering the health and safety of the surrounding community or the environment.

In many cases, an applicant must conduct an environmental review pursuant to the State Environmental Quality Review Act (SEQRA), New York Environmental Conservation Law (ECL) Article 8, and additional conditions on operation of siting of a facility may be required as a result of the review. Following such a review, in 1998 the Village issued a negative declaration for the Metro/Allied facility under SEQRA – a finding that the facility would not have significant adverse environmental impacts – predicated on Metro/Allied's adherence to limitations on the quantity of wastes that could be handled and the hours of operation. These restrictions were imposed, for among other reasons, to limit truck traffic through surrounding communities.

Should the proposed transactions go forward, NIR has stated that it will continue operations at the facility, but has not specified exactly how and to what degree the operations will be conducted. While NIR has expressed "its willingness to proceed with a spirit of cooperation and to operate in accordance with applicable federal, state and local regulations, including the regulations of the New York State Department of Environmental Conservation and the Westchester County Solid Waste Commission as they apply to waste transfer operations that do not involve rail carriers," NIR also has stated that "[t]his is not to say, however, that NIR will not avail itself of the ability to seek the preemption of such state and local regulations if their application interferes with or prevent rail operations . . .." NIR statement, filed August 12, 2005, at p. 6.

As the STB recognized in its August 5, 2005, decision, the issues raised in these filings are "important," have "generated substantial local interest," and are "issues that should be addressed by the Board before the exemption is allowed to become effective." These issues are intensely factual, and a full record needs to be developed before they may be decided. *See*,

Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324, 1332-3, 1336 (11th Cir. 2001) (examination of facts to determine whether activities fall within definition of transportation); *Hi Tech Trans, LLC v. State of New Jersey*, 382 F.3d 295 (3d Cir. 2004) (same).

Moreover, in *Boston and Me. Corp. and Town of Ayer, Ma.*, STB Finance Docket No. 33971 (April 30, 2001), at 11-12 (footnotes deleted), the STB expressed its view of the need for railroads to work closely with states and local communities notwithstanding the possible preemption of state and local regulatory authority:

> Like any citizen or business, railroads have some responsibility to work with communities to seek ways to address local concerns in a way that makes sense and protects the public health and safety, and to assume responsibility if they act negligently. But at the same time, literal compliance with state or local laws often may be impractical in cases involving railroad facilities. Thus, as the court indicated in *Ridgefield Park*, a certain degree of pragmatism on the part of communities and cooperation on the part of railroads is necessary to reach reasonable solutions to state and local concerns that do not unreasonably interfere with interstate commerce.
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> Examples of solutions that appear to us to be reasonable include conditions requiring railroads to (1) share their plans with the community, when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.
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> Communities also can enforce their local codes for electrical, building, fire, and plumbing, unless the codes are applied in a discriminatory manner, unreasonably restrict the railroad from conducting its operations, or unnecessarily burden interstate commerce.

At present, NIR – the newly created entity that seeks to become a railroad – has done little if anything to discharge its "responsibilit[ies]" in this regard. It has not submitted its operational plans to DEC, and has failed to disclose what best management practices and

precautionary measures it will implement, if any. No meetings with DEC, the Village, or citizen groups have occurred to our knowledge. DEC has received no communication from NIR regarding any proposed transfer of Metro/Allied's permit. The potential impacts of the new operations on the environment have not be addressed in any detail, with NIR only stating that there will be positive impacts arising from an assumed lessening of truck traffic, citing a generic study that calls for an improved rail freight system but not addressing this facility.

Consequently, the State and DEC believe that the most appropriate course is for the STB to continue the stay of the filings' effectiveness and hold a hearing (either oral or through the receipt of written statements, as appropriate, pursuant to 49 C.F.R. § 1112.1 *et seq.*) to develop the factual record, including disclosure of the applicant's operational plans. Only after all interested parties have enjoyed the opportunity to comment on a full factual record will the STB be in a position to reach an appropriate disposition.

DATED: August 15, 2005

Respectfully submitted,

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